

2002

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Lica Tomizuka, *The Supreme Court's Blind Pursuit of Outdated Definitions of Familial Relationships in Upholding the Constitutionality of 8 U.S.C. 1409 in Nguyen v. INS*, 20 LAW & INEQ. 275 (2002).

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The Supreme Court's Blind Pursuit of Outdated Definitions of Familial Relationships in Upholding the Constitutionality of 8 U.S.C. § 1409 in *Nguyen v. INS*

Lica Tomizuka*

Introduction

Imagine being born out of wedlock overseas to a non-U.S. citizen mother and a U.S. citizen father but spending your entire life in the United States. You befriend another person also born out of wedlock overseas, but to a U.S. citizen mother and a non-U.S. citizen father. The two of you commit robbery at a local gas station. Both of you are convicted and sentenced to eight years in prison. After your conviction, the Immigration and Naturalization Service (INS) begins removal proceedings against you, but not against your robbery partner. Why? Because your father failed to take an administrative step and legitimate you as his child before you turned eighteen. You always assumed you were a U.S. citizen, but were mistaken. You never looked into getting a passport, and you never voted. If you had, your citizenship status would have been brought to your attention. INS is now planning to send you "back" to a country you do not know, where you have no family, do not speak the language, and do not know the culture. In essence, a country foreign to you. To make matters worse, you find out that "your" country does not want you back. The INS determines that you will be held in a detention center until it can make arrangements with another country for your departure. Do the Supreme Court and the U.S. government support such a process

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that harms children because of something their fathers failed to do—something that, arguably, they should not be required to do in the first place? They do.

In June 2001, the Supreme Court decided *Nguyen v. INS*.¹ Tuan Anh Nguyen (Nguyen) was born out of wedlock in Vietnam to Joseph Boulais, a U.S. citizen working in Vietnam as an engineer, and Hung Thi Nguyen, a Vietnamese citizen.² Soon after Nguyen's birth, his mother abandoned him and left his upbringing to his father.³ Boulais subsequently married another Vietnamese citizen.⁴ In 1975, Saigon fell to the North Vietnamese troops.⁵ Nguyen, six years old, escaped Vietnam with Boulais' wife.⁶ Nguyen was paroled⁷ into the United States as a refugee a few months later, whereupon he and Boulais were reunited.⁸ Under the Indochinese Refugee Act,⁹ Nguyen gained permanent

1. 121 S. Ct. 2053 (2001).

2. See Brief for Petitioner at 5, *Nguyen v. INS*, 2000 WL 1706737 (2001) (No. 99-2071) (stating that Tuan Anh Nguyen is Boulais and Hung Thu Nguyen's illegitimate child); Victoria Graham, *In the Courts: Sex Bias in Citizenship Law Challenged*, WOMEN'S ENEWS (Jan. 10, 2001) (stating that Boulais was working in Vietnam as an engineer), at <http://www.womensenews.org/article.cfm/dyn/aid/400/context/archive>.

3. See Brief for Petitioner, *supra* note 2, at 4.

4. See *id.*

5. See *id.*

6. See *id.*

7. The U.S. Attorney General has parole power, which allows him or her to permit any alien seeking admission to the United States to enter temporarily for emergency reasons or for reasons strictly in the public interest. See DAVID WEISSBRODT, *IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL* 104 (4th ed. 1998).

8. See Brief for Petitioner, *supra* note 2, at 5.

9. 8 U.S.C. § 1255 (2000). Under this act, the INS granted permanent resident status to Indochinese refugees without regard to public exclusion, immigration documentation, or literacy requirements. See *id.* The purpose of granting permanent resident status to Indochinese refugees who came from the former French Indochinese colonies of Vietnam, Laos, and Cambodia was to provide a sanctuary to the Vietnamese who were considered "at risk" because of their connection to the United States during the Vietnam War. IMMIGRATION AND NATURALIZATION SERV., U.S. DEPT OF JUSTICE, *THIS MONTH IN IMMIGRATION HISTORY: JULY 1979* (explaining which countries' refugees qualify under the Indochinese Refugee Act and describing the reasons for and the process of evacuation and exodus from Vietnam in 1975 and subsequent years), at <http://www.ins.usdoj.gov/graphics/aboutins/history/july79.htm> (last modified Feb. 4, 2002). Between 1977 and 1997, over 175,000 refugees obtained permanent residency status under the Indochinese Refugee Act. See IMMIGRATION AND NATURALIZATION SERV., U.S. DEPT OF JUSTICE, *1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE* 92 tbl.31 (1997) (breaking down the numbers of refugees and asylees granted permanent resident status under various enactments between 1946 and 1997), available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/1997YB.pdf>.

resident status.¹⁰ At the age of twenty-two, Nguyen was indicted and pled guilty to two counts of sexual assault of a minor.¹¹ Subsequently, the INS started removal¹² proceedings against him.¹³

10. See Brief for Petitioner, *supra* note 2, at 5.

11. See *Nguyen v. INS*, 208 F.3d 528, 530 (5th Cir. 2000) (stating that Nguyen pled guilty to two felony charges of assault on a minor); CRIME RECORDS SERV., TEX. DEP'T OF PUBLIC SAFETY, SEX OFFENDER DATABASE, CRIME RECORD OF TUAN ANH NGUYEN [hereinafter CRIME RECORD] (listing Nguyen as a sex offender in a public record available on the internet), <http://records.txdps.state.tx.us/soSearch/soSearch.cfm> (last visited Mar. 24, 2002).

12. "Deportation proceedings" are now referred to in statutes as "removal proceedings." See Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, Div. C (1996) (redefining old immigration terms such as "deport" and "deportation"). Many courts, like the *Nguyen* Supreme Court, still use the old terminology in their opinions. See generally *Nguyen v. INS*, 121 S. Ct. 2053 (2001). The new terminology as it appears in IIRIRA will be used in this Comment.

13. See *Nguyen*, 121 S. Ct. at 2053. Under the Immigration and Nationality Act (INA), the INS may remove an alien if he or she is convicted of a crime of moral turpitude punishable by a sentence of one year or longer. 8 U.S.C. § 1227(a)(2)(A)(i) (2000). "Moral turpitude" is not defined in the INA, but most courts evaluate whether a crime involves moral turpitude on whether the inherent nature of the act includes elements that demonstrate the perpetrator's "baseness, vileness and depravity." *Tutrone v. Shaughnessy*, 160 F. Supp. 433 (S.D.N.Y. 1958); see also Lawyers' Coop. Publ'g Co. & Bancroft-Whitney Co., Annotation, *What Constitutes "Crime Involving Moral Turpitude" Within Meaning of §§ 212(a)(9) and 241(a)(4) of Immigration and Nationality Act* (8 U.S.C.A. §§ 1182(a)(9), 1251(a)(4)), and *Similar Predecessor Statutes Providing for Exclusion or Deportation of Aliens Convicted of Such Crime*, 23 A.L.R. FED. 480 (2000) [hereinafter Lawyer's Coop. Publ'g Co.] (describing crimes involving moral turpitude as including homicide, manslaughter, assault, robbery, burglary, embezzlement, extortion, bigamy, incest, indecent assault, and rape). The INS may also remove an alien who commits two or more crimes of moral turpitude arising out of different incidences of criminal misconduct regardless of the possible length of punishment. 8 U.S.C. § 1227(a)(2)(A)(ii). The INS removed more than 350,000 convicted aliens between 1997 and 2001. See IMMIGRATION AND NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, SEPTEMBER 2001 MONTHLY STATISTICAL REPORT, END OF FY 2001: REMOVALS (showing that between January 2001 and September 2001, more than 70,000 aliens, over forty percent of the total aliens removed, were removed due to their convictions not limited to those involving moral turpitude, and during the 2000 fiscal year, more than 71,000 aliens were removed due to their convictions), at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/msrsep01/REMOVAL.HTM>; IMMIGRATION AND NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, SEPTEMBER 2000 MONTHLY STATISTICAL REPORT, END OF FY 2000: REMOVALS (showing that during the 1999 fiscal year close to 70,000 aliens were removed due to their convictions), at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/msrsep00/REMOVAL.HTM>; IMMIGRATION AND NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, SEPTEMBER 1999 MONTHLY STATISTICAL REPORT, END OF FY 1999: REMOVALS (showing that during the 1998 fiscal year more than 55,000 aliens were removed due to their convictions), at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/msrsep99/REMOVAL.HTM>; IMMIGRATION AND NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, SEPTEMBER 1998 MONTHLY STATISTICAL REPORT, END OF FY 1998: REMOVALS (showing that during the 1997 fiscal year more than 51,000 aliens were removed due to their

Nguyen and his father contested the removal order on the basis that 8 U.S.C. § 1409¹⁴ violates the Due Process Clause and equal protection component of the Fifth Amendment.¹⁵ They challenged § 1409 because it provides different citizenship procedures for children born out of wedlock overseas depending on which parent—the mother or father—is a U.S. citizen.¹⁶ Nguyen argued that clear and convincing evidence in the form of a DNA test result showing that Boulais was Nguyen's father was sufficient to determine parentage.¹⁷ The Supreme Court rejected this genetic evidence because it was not one of the methods prescribed for legitimation as articulated by Congress in § 1409.¹⁸

Referring to its decision in *Miller v. Albright*,¹⁹ the Court held that § 1409 was constitutional under the Due Process Clause of the Fifth Amendment because the legitimation procedures were substantially related to achieving the important governmental objectives of establishing a biological parent-child relationship and providing the opportunity for the parent and child to establish a meaningful relationship.²⁰ The Court emphasized the "real"

convictions), at
<http://www.ins.usdoj.gov/graphics/aboutins/statistics/msrfy98/REMOVAL.HTM>.

14. 8 U.S.C. § 1409. This section governs the nationality and naturalization of children born out of wedlock in foreign countries to mothers or fathers who are U.S. citizens. *See id.*

15. *See Nguyen*, 121 S. Ct. at 2058. Under a literal reading of the Constitution, the federal government is not required to provide equal protection of the law, but the Supreme Court has extended the equal protection requirement stated in the Fourteenth Amendment, U.S. CONST. amend. XIV, § 1, to the Due Process Clause of the Fifth Amendment, U.S. CONST. amend. V. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding school segregation in the District of Columbia unconstitutional, not under the Fourteenth Amendment Equal Protection Clause because the Fourteenth Amendment only applies to states, but under the Fifth Amendment's Due Process Clause).

16. 8 U.S.C. § 1409(c) (granting automatic U.S. citizenship status to a child of a citizen mother where the child is born abroad and out of wedlock, but requiring an affirmative administrative act by a U.S. citizen father for his child to receive U.S. citizenship); for the text of § 1409 see *infra* note 55.

17. *See Nguyen*, 121 S. Ct. at 2060.

18. *See id.* at 2060-61; *infra* notes 56-60 and accompanying text.

19. 523 U.S. 420, 440 (1998) (holding that the additional proof of paternity required for citizenship by birth where the citizen parent of the child born abroad and out of wedlock is the father is not an unconstitutional denial of equal protection based on the sex of the citizen parent); *see also* discussion *infra* Part I.B. (explaining how the INA treats mothers and fathers differently).

20. *See Nguyen*, 121 S. Ct. at 2057-58. Courts apply intermediate scrutiny to gender-based classifications. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (applying intermediate scrutiny to policy denying women admission to Virginia Military Institute because of their gender and holding that the policy violated their equal protection rights). A statute overcomes intermediate scrutiny if the discriminatory means employed are "substantially related" to the

difference between mothers and fathers based on the required presence of a mother at the birth of the child.²¹ The Court deferred to Congress' prescribed legitimation requirements for a U.S. citizen father to transfer citizenship to his non-marital child born overseas: a sworn declaration of paternity or a court order of paternity before the child's eighteenth birthday.²² Upon the Court's finding that § 1409 was constitutional, the INS executed Nguyen's removal order.²³ Because Vietnam rarely repatriates deportees from the United States,²⁴ observers anticipated that the INS would hold Nguyen in an INS detention center indefinitely.²⁵ Nguyen's current whereabouts are unknown.²⁶

achievement of "important governmental objectives." *Id.*

21. See *Nguyen*, 121 S. Ct. at 2061. The Court allows different treatment of men and women where a "real" difference has been exhibited. See, e.g., *Virginia*, 518 U.S. at 533 (holding that the physical differences between men and women are "real" and do not make sex a proscribed classification).

22. See *Nguyen*, 121 S. Ct. at 2060.

23. See Ji Hyun Lim & Associated Press, *Mother's Status Determines Citizenship*, ASIANWEEK.COM (June 22, 2001), at http://www.asianweek.com/2001_06_22/news2_supremecourt_citizen.html.

Immigration procedures permit an alien to challenge an order of removal before it is executed. See WEISSBRODT, *supra* note 7, at 215. Once the order of removal is finalized administratively or after judicial review, or once the alien is released from detention, whichever is later, the Attorney General has ninety days to remove the alien from the United States. 8 U.S.C. § 1231(a)(1).

24. See Amy Ballentine, *Commentary: Supreme Court, INS Deal Double Blow to Children*, SISKIND'S IMMIGRATION BULL. (Siskind, Susser, Haas & Devine, Memphis, Tenn.) (June 15, 2001) (noting that Vietnam does not generally repatriate criminal aliens from the United States), at <http://www.visalaw.com/01jun3/17jun301.html>; see also Patricia Flynn et al., *Five Years Later: Fifth Circuit Case Law Developments Under the Illegal Immigration Reform and Immigrant Responsibility Act*, 53 BAYLOR L. REV. 557, 617 (2001) (stating that Vietnam refuses to repatriate its citizens).

25. See Graham, *supra* note 2. During the removal period, the alien is held in a detention center. 8 U.S.C. § 1231(a)(2). An alien being removed due to criminal convictions may select a country to which he would like to be removed. 8 U.S.C. § 1231(b)(2)(A). But if the government of that country does not respond within thirty days of the request to take the alien back, the Attorney General may designate an alternative country to which the alien will be deported, the first choice being the country where the alien is a subject, citizen, or national. 8 U.S.C. § 1231(b)(2)(C), (D). Where the alien is classified as an "aggravated felon," he may be held longer than the general six-month limit on detention. See *Tran v. Caplinger*, 847 F. Supp. 469, 475 (W.D. La. 1993). However, recent cases have challenged the constitutionality of detaining aliens indeterminately in removal holding centers. See, e.g., *Zadvydas v. Davis*, 121 S. Ct. 2491, 2498-99 (2001) (holding that the post-detention-removal statute read in light of the Constitution's demands requires an alien's detention to be limited to a reasonable period necessary to remove the alien from the United States and does not permit indefinite detention); see also Marisel Acosta, *"Unremovable" Criminal Resident Aliens Awaiting Deportation: Can the INS Detain Them Indefinitely?*, 73 TEMP. L. REV. 1363 (2000) (arguing that indefinitely detaining criminal aliens who can not be deported is unconstitutional).

26. It appears that Nguyen is living in Texas, but there is no confirmation. See

Part I of this Comment provides the context for the *Nguyen* decision through an examination of relevant statutes, legislative history, and case law preceding the decision.²⁷ Part II explains the *Nguyen* holding and reasoning in detail.²⁸ Part III argues that the Supreme Court had the power to review the legitimation requirements of § 1409 and criticizes the Court for misapplying the intermediate scrutiny standard.²⁹ This Comment further argues that the Court erroneously endorsed outdated images of fathers, mothers, and families. In conclusion, this Comment finds that the Court has the power to review the constitutionality of the means in which Congress exercises its plenary power and that § 1409 discriminates invidiously between mothers and fathers, resulting in harm to a politically powerless class of people.

I. The Law Prior to *Nguyen v. INS*

A. Congress Has Plenary Power to Regulate Immigration and Citizenship, but Its Absoluteness Is Questionable

Congress is a governmental branch of limited powers.³⁰ Its powers include those that are enumerated in Article I of the Constitution and those deemed "necessary and proper"³¹ to execute the enumerated powers.³² Congress' power to regulate immigration and citizenship is not enumerated in the Constitution. Congress, however, has the power "[t]o regulate Commerce with foreign Nations,"³³ and the Supreme Court has used this language to invalidate state statutes attempting to regulate immigration.³⁴ The express language of the Constitution provided that, prior to 1808, Congress' power to prohibit the "Migration or Importation of such Persons as any of the States

CRIME RECORD, *supra* note 11 (stating Nguyen's home address).

27. See *infra* notes 30-146 and accompanying text.

28. See *infra* notes 147-182 and accompanying text.

29. See *infra* notes 183-248 and accompanying text.

30. See STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 10 (3d ed. 2002) (stating that Congress' powers are limited).

31. U.S. CONST. art. I, § 8, cl. 18.

32. See LEGOMSKY, *supra* note 30, at 10 (stating that Congress' powers are enumerated in the Constitution or are "necessary and proper" to execute the enumerated powers).

33. U.S. CONST. art. I, § 8, cl. 3.

34. See, e.g., *Passenger Cases*, 48 U.S. (7 How.) 283, 409-10 (1849) (relying on Congress' power to regulate commerce with foreign nations to strike down New York and Massachusetts statutes that imposed head taxes on noncitizen passengers).

now existing shall think proper to admit"³⁵ was limited. Thus, this clause has been read to imply that Congress has had the power to prohibit migration and importation since 1808.³⁶ Although Congress has the power "[t]o establish an uniform Rule of Naturalization,"³⁷ naturalization is not synonymous with immigration, and the power has been criticized as a source of federal immigration power.³⁸

Even though the Supreme Court has not clearly decided which enumerated power gives Congress the power to regulate immigration, it has stated that the authority to admit and expel aliens at Congress' discretion is "too clearly within the essential attributes of sovereignty to be seriously contested."³⁹ Since then, the Court has reaffirmed Congress' authority to regulate citizenship and immigration under its plenary power, requiring judicial deference to Congress in matters involving immigration.⁴⁰

35. U.S. CONST. art. I, § 9, cl. 1.

36. See LEGOMSKY, *supra* note 30, at 12 (stating that it appears that "Congress may prohibit (and, a fortiori, restrict) migration and importation after 1808").

37. U.S. CONST. art. I, § 8, cl. 4.

38. See LEGOMSKY, *supra* note 30, at 12 (stating that naturalization is related to a non-U.S. citizen's membership in a political community, whereas immigration is related to a non-U.S. citizen's movement in and out of the United States). Congress, however, has used its constitutional authority "[t]o establish an uniform Rule of Naturalization" to enact legislation requiring lawful admission as a permanent resident before a non-U.S. citizen can qualify for naturalization. See 8 U.S.C. § 1427 (describing the eligibility requirements for naturalization).

39. *Chae Chan Ping v. United States*, 130 U.S. 581, 607 (1889) (relying on Congress' general power to regulate foreign affairs in upholding the constitutionality of the Act of 1888 that prohibited Chinese laborers from re-entering the United States even though they had secured permission to return before the Act had passed).

40. See *Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982) (noting that the judiciary's role with respect to immigration is limited and does not extend to displace congressional policy choices); *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) (stating that courts will not review policy decisions made by Congress while exercising its power over immigration and naturalization even if it makes rules that would be considered unacceptable if applied to citizens); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 216 (1953) (stating that where respondent was denied entry into the United States without a hearing, the "respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate"); *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) (stating that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens); *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1892) (recognizing that Congress may submit its decision to exclude aliens to judicial review at its discretion); Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 12 GEO. IMMIGR. L.J. 257, 257 (2000) (stating that the plenary power is construed to isolate immigrant classifications from judicial review). But see Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 7

The limits of federal immigration power are starting to be tested, and so far there appear to be some regulations that Congress is not permitted to enact and enforce upon aliens. The Supreme Court in *Fiallo v. Bell*⁴¹ stated that Congress' power was "largely immune from judicial control," thus leaving open the possibility that immigration provisions could be struck.⁴² Courts have stated that the plenary power doctrine may not apply to all First Amendment challenges in a removal hearing.⁴³ Courts have also invalidated various immigration-related statutes, previously thought to be immune from judiciary review, on grounds that they are unconstitutional.⁴⁴ The courts have recognized that Congress' power to regulate immigration affairs is not completely immune to judicial review.⁴⁵

B. Mothers and Fathers Are Treated Differently Under the Immigration and Nationality Act (INA)

U.S. citizenship laws combine two basic principles that confer citizenship at the moment of birth.⁴⁶ *Jus sanguinis*, meaning "right of the blood"—also known as "citizenship by descent" or "derivative citizenship"—grants citizenship to the children of a

(1998) (arguing that the Supreme Court treats immigration constitutional law inconsistently with domestic constitutional law).

41. 430 U.S. 787, 792 (1977).

42. *Id.* at 792; see generally Collin O'Connor Udel, *Miller v. Albright: Plenary Power, Equal Protection, and the Rights of an Alien Love Child*, 12 GEO. IMMIGR. L.J. 621 (1998) (examining the *Miller* decision in light of the continuing erosion of the plenary power doctrine and the rise of gender-neutral jurisprudence, even in the context of immigration law).

43. See *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (barring First Amendment claims in removal hearings except where the prosecution reflects discrimination "so outrageous that the foregoing considerations can be overcome").

44. See *Zadvydas v. Davis*, 121 S. Ct. 2491, 2505 (2001) (holding that an alien may not be held in a detention center indeterminately where there is no real likelihood of removal in the "reasonably foreseeable future," contrary to the INS' practice of holding criminal aliens indeterminately past the ninety-day removal period prescribed by statute); *INS v. Chadha*, 462 U.S. 919, 940-41 (1983) (striking a federal statutory provision concerned with the expulsion of non-U.S. citizens and stating that "[t]he plenary authority of Congress over aliens under [the naturalization clause] is not open to question but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power"); *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976) (striking a section of the INA based on the lack of equal protection of the laws under the Fifth Amendment); *Manwani v. U.S. Dep't of Justice*, 736 F. Supp. 1367, 1382 (W.D.N.C. 1990) (holding that a section of the Immigration Marriage Fraud Act violated due process).

45. See *supra* notes 41-44 and accompanying text.

46. LEGOMSKY, *supra* note 30, at 1193.

country's existing citizens, regardless of where the child is born.⁴⁷ Literally translated "right of the land," *jus soli* grants citizenship to people born within its territory.⁴⁸ The *jus soli* principle is evident in the Fourteenth Amendment, which states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."⁴⁹

Congressional citizenship statutes enacted before 1934, embodying the *jus sanguinis* principle, were strongly biased in favor of the father, stating that foreign-born children of only U.S. citizen fathers would be considered U.S. citizens.⁵⁰ Starting in 1940, Congress enacted citizenship statutes biased against the father in an attempt to limit citizenship claims from those "who would be a potential liability rather than an asset."⁵¹

47. *See id.*

48. *See id.*

49. U.S. CONST. amend. XIV, § 1. Citizenship laws in many countries, particularly in the Middle East and in some Asian and African countries, tend to favor fathers over mothers. *See* Joanne Mariner, *Citizen Dad: An International Perspective on the Supreme Court's Nguyen Case*, FINDLAW'S LEGAL COMMENT. (Jan. 11, 2001), at <http://writ.news.findlaw.com/mariner/20010111.html>. Some countries do not grant citizenship to legitimate children born to citizen mothers and foreign fathers, and other countries do not permit a mother to transfer citizenship to her children at all. *See id.*

50. Pursuant to the first U.S. legislation on this matter, an alien child's citizenship depended on his father's status in the United States. *See* Act of Mar. 26, 1790, ch. 3, § 1 Stat. 103, 104 (repealed 1795). The Act specifically stated:

[T]he children of citizens of the United States, that may be born beyond seas, or out of the limits of the United States, shall be considered as natural born citizens: *Provided*, That the right of citizenship shall not descent to persons whose fathers have never been resident in the United States.

Id. Similarly, an act of 1855 said:

That all persons heretofore born, or hereafter born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States: *Provided, however*, That the rights of citizenship shall not descend to persons whose fathers never resided in the United States.

Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604 (repealed 1940).

51. H.R. REP. NO. 76-2396, at 2 (1940) (introducing the bill known as the Nationality Act of 1940). Congress was concerned about "young people, men for the most part, who are on duty with the Armed Forces in foreign countries." *See* *Nguyen v. INS*, 121 S. Ct. 2053, 2062 (2001) (citing U.S. DEP'T OF DEF., SELECTED MANPOWER STATISTICS 48, 74 (1999) (reporting that in 1969, the year in which Nguyen was born, there were 3,458,072 active duty military personnel, 39,506 of whom were female); U.S. DEP'T OF DEF., SELECTED MANPOWER STATISTICS 29 (1970) (noting that 1,041,094 military personnel were stationed in foreign countries in 1969); and U.S. DEP'T OF DEF., SELECTED MANPOWER STATISTICS 49, 76 (1999) (reporting that in 1999 there were 1,385,703 active duty military personnel, 200,287 of whom were female and that 252,763 military personnel were stationed

Currently, §§ 1401 and 1409 of Title 8 of the U.S. Code govern citizenship requirements for children born to U.S. citizens overseas.⁵² Section 1401(g) provides that where a child is born overseas to a non-U.S. citizen parent and a U.S. citizen parent, the child may be deemed a U.S. citizen if the U.S. citizen parent meets all of the listed requirements.⁵³ Under § 1401(g), the U.S. citizen parent must have been physically present in the United States for more than five years, at least two of which were after that parent turned fourteen.⁵⁴

The requirements in § 1409 impose an additional burden on the U.S. citizen father of an illegitimate child born overseas.⁵⁵ He

in foreign countries in 1999)).

52. 8 U.S.C. §§ 1401, 1409 (2000). Sections 1402 to 1408 apply to children born in a noncontiguous U.S. state such as Hawaii and to children born in U.S. territories such as Guam and the U.S. Virgin Islands. 8 U.S.C. §§ 1402-1408 (2000).

53. 8 U.S.C. § 1401(g). Section 1401(g) states:

The following shall be nationals and citizens of the United States at birth . . .

(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years: Provided, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization . . . by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization . . . may be included in order to satisfy the physical-presence requirement of this paragraph.

Id.

54. *Id.*

55. 8 U.S.C. § 1409 (2000). Section 1409 states:

(a) The provisions of paragraphs (c), (d), (e), and (g) of section 1401 of this title, and of paragraph (2) of section 1408 of this title, shall apply as of the date of birth to a person born out of wedlock if—

(1) a blood relationship between the person and the father is established by clear and convincing evidence,

(2) the father had the nationality of the United States at the time of the person's birth,

(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

(4) while the person is under the age of 18 years—

(A) the person is legitimated under the law of the person's residence or domicile,

(B) the father acknowledges paternity of the person in writing under oath, or

(C) the paternity of the person is established by adjudication of a competent court.

must prove his blood relationship with the child by clear and convincing evidence,⁵⁶ have had U.S. citizenship at the time the child was born,⁵⁷ have agreed in writing to provide financial support to the child,⁵⁸ and legitimate the child before the child is eighteen years old by performing one of three acts: legitimate the child under the laws recognized under that jurisdiction, acknowledge paternity in writing under oath, or establish paternity by adjudication in court.⁵⁹ In contrast, the mother of an illegitimate child born overseas is specifically exempt from these requirements under § 1409(c), and as such, a child born out of wedlock to a U.S. citizen mother acquires citizenship at birth, provided the mother had U.S. citizenship at the time of the birth and had been in the United States for a continuous period of one year before the birth.⁶⁰

The Supreme Court evaluated the constitutionality of § 1409 in *Miller v. Albright*.⁶¹ Lorelyn Penero Miller (Miller) was born out of wedlock in the Philippines to a Filipino mother and a U.S. citizen father.⁶² Miller's father was a member of the U.S. military stationed in the Philippines at the time of Miller's conception.⁶³ He apparently did not know of his daughter's existence until she was twenty-one years old.⁶⁴ Miller's father filed a request for a Voluntary Paternity Decree declaring him as her biological father.⁶⁵ The Texas court granted Miller's father the decree,

(b) Except as otherwise provided in section 405 of this Act, the provisions of section 1401(g) of this title shall apply to a child born out of wedlock on or after January 13, 1941, and before December 24, 1952, as of the date of birth, if the paternity of such child is established at any time while such child is under the age of twenty-one years by legitimation. (c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

Id.

56. *See id.* § 1409(a)(1).

57. *See id.* § 1409(a)(2).

58. *See id.* § 1409(a)(3).

59. *See id.* § 1409(a)(4).

60. *See id.* § 1409(c).

61. 523 U.S. 420 (1998).

62. *See id.* at 425.

63. *See id.*

64. *See id.*

65. *See id.* at 426. A voluntary paternity decree is the equivalent of legal recognition of paternity. OFFICE OF THE ATTORNEY GEN., STATE OF TEX., WHAT DOES ESTABLISHING LEGAL FATHERHOOD MEAN TO YOUR CHILD?, at

finding him "to be the biological and legal father of Lorelyn Penero Miller."⁶⁶ Miller then filed an application for registration and documentation as a U.S. citizen.⁶⁷ The State Department denied her citizenship application, citing her father's failure to meet the legitimation requirement of § 1409(a).⁶⁸ Miller appealed the denial of her application, but the Office of Citizen Consular Services of the State Department upheld its original decision.⁶⁹

Miller and her father sought a judgment in the United States District Court for the Eastern District of Texas declaring Miller to be a U.S. citizen.⁷⁰ They challenged § 1409 on the basis that it violated the equal protection component of the Fifth Amendment.⁷¹ After dismissing Mr. Miller as a party, the court moved the case to the District Court for the District of Columbia.⁷² The district court, however, stated that because the legitimation requirements of § 1409(a) had not been satisfied, it was unable to confer citizenship.⁷³ It further stated that even if § 1409 did violate the equal protection requirement, the court lacked the power to grant citizenship because "only Congress has the power to confer citizenship to persons not constitutionally entitled to citizenship."⁷⁴ Miller appealed the district court's decision to the Court of Appeals for the District of Columbia.⁷⁵

The court of appeals, citing *Fiallo v. Bell*,⁷⁶ held that the

<http://www.oag.state.tx.us/child/why.htm> (last revised July 1999). The father is held responsible for the monetary support of the child according to each state's child support guidelines and has the right to legal and enforceable visitation. See *id.* In Texas, paternity may be established using a blood test. See *id.*

66. See *Miller v. Albright*, 523 U.S. at 425 (quoting the trial court's decree).

67. See *id.* at 426.

68. See *id.* (quoting a letter sent by the State Department rejecting Miller's application for registration as a U.S. citizen, which said: "Without such legitimation before age eighteen, there is no legally recognized relationship under the INA and the child acquires no rights of citizenship through an American citizen parent").

69. See *Miller v. Christopher*, 870 F. Supp. 1, 2 (D.D.C. 1994).

70. See *Miller v. Albright*, 523 U.S. at 426.

71. See *id.*

72. See *id.*

73. See *Miller v. Christopher*, 870 F. Supp. at 2.

74. *Id.* at 3.

75. See *Miller v. Christopher*, 96 F.3d 1467 (D.C. Cir. 1996), *aff'd sub nom. Miller v. Albright*, 523 U.S. 420 (1998). The Court of Appeals for the District of Columbia heard the appeal because the Texas district court granted the government's motion to transfer venue to the District of Columbia. See *Christopher*, 870 F. Supp. at 1.

76. 430 U.S. 787 (1977). *Fiallo* addressed the issue of whether an alien illegitimate child or an alien unwed biological father of a non-alien child could receive special immigration preference by virtue of a relationship to a U.S. citizen or permanent resident alien child or parent under 8 U.S.C. §§ 1101(b)(1)(D) and

additional requirements imposed on the illegitimate children of a U.S. citizen father did not violate the equal protection requirement.⁷⁷ *Fiallo* involved a different section of the INA that distinguished alien children on the basis of their legitimacy and the U.S. citizen parent's gender.⁷⁸ Taking a deferential stance towards Congress, the *Miller* court stated that "a mother is far less likely to ignore the child she has carried in her womb than is the natural father, who may not even be aware of its existence."⁷⁹ *Miller* petitioned for a writ of certiorari, which was granted by the Supreme Court.⁸⁰

The Supreme Court's decision was splintered, but *Miller*'s challenge to § 1409(a) failed by a six-to-three vote.⁸¹ The Court affirmed the court of appeals' decision on three distinctly different grounds, yielding a result without a majority opinion.⁸² Justice Stevens and Chief Justice Rehnquist affirmed the court of appeals' opinion,⁸³ basing their reasoning on the important and real difference inherent in the birthing event. Because of this difference, the mother's legal relationship is established by the birth itself, while the father's legal relationship is dependent on his post-birth conduct.⁸⁴ Justice Kennedy joined Justice O'Connor

(b)(2). *Id.* at 789. 8 U.S.C. §§ 1151(a), 1151(b), and 1181(a)(1) (2000) give special immigration status to those who satisfy the statutory "parent-child" relationship. *Id.* A "child" as defined under the INA is an unmarried person under the age of twenty-one who is a legitimate or legitimated child, a stepchild or adopted child, or an illegitimate child seeking preference by virtue of his or her relationship with his or her natural mother. 8 U.S.C. § 1101(b)(1) (2000). The definition of a "parent" depends on the person's relationship with the "child" as defined under the INA. *Id.*

77. See *Miller v. Christopher*, 96 F.3d at 1471.

78. See *Fiallo*, 430 U.S. at 797.

79. *Miller v. Christopher*, 96 F.3d at 1472.

80. See *Miller v. Albright*, 520 U.S. 1208 (1997) (granting certiorari to resolve whether the legitimation requirements under § 1409(a) represented an unconstitutional denial of equal protection based on the gender of the parent).

81. See *Miller v. Albright*, 523 U.S. 420, 420 (1998).

82. See *id.* at 420. Where there is no clear majority, the case's value as precedent rests on the narrowest grounds upon which there is a majority of votes. See Maxwell L. Stearns, *The Case for Including Marks v. United States in the Canon of Constitutional Law (Symposium: The Canon(s) of Constitutional Law)*, 17 CONST. COMMENT. 321, 326 (2000) (quoting *Marks v. United States*: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'" (internal citations omitted)).

83. See *Miller v. Albright*, 523 U.S. at 423-46. In distinguishing *Miller* from *Fiallo*, Justice Stevens noted *Miller* involved a challenge related to citizenship, while *Fiallo* was concerned with claims of alienship for special immigration preference. See *id.* at 429.

84. See *id.* at 436. In a case decided fifteen years before *Miller*, Justice Stevens argued that differences in parental involvement originated in biological differences.

in deciding that Miller only had standing to bring claims on her own behalf and thus could not bring the issue of whether her father's equal protection rights had been violated.⁸⁵ O'Connor stated that Miller's claim would only receive rational basis scrutiny because § 1409(a) did not have a gender classification with respect to the child.⁸⁶ According to O'Connor, the statute survived rational basis scrutiny.⁸⁷ Justices Scalia and Thomas concurred in the final result but based their decision on the Court's inability to confer citizenship without authority provided by Congress.⁸⁸

Subsequent to the *Miller* decision, Congress enacted the Child Citizenship Act of 2000 (CCA).⁸⁹ The CCA lays out the scenarios in which a child born outside of the United States automatically becomes a U.S. citizen.⁹⁰ It was enacted in response to the number of stories of long-term permanent residents adopted by U.S. citizens who faced removal because they never became citizens.⁹¹ The parents who adopted children from abroad assumed that the children were automatically made citizens during the adoption process and never legitimated them.⁹² Although the CCA applies equally to both biological and adopted children and makes no reference to marital status requirements,

See Lehr v. Robertson, 463 U.S. 248, 260 n.16 (1983). He stated that the man has no commitment to a fetus or baby compared to the woman who must commit to the fetus when she chooses to carry the pregnancy to term. *See Caban v. Mohammed*, 441 U.S. 380, 399 (1979) (Stevens, J., dissenting). He also commented that the woman is necessarily at the birth of the baby, and a father may not be present. *See id.* *See also Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974) (denying a challenge by four pregnant women to a provision of California's disability insurance program, based on the premise that pregnancy distinguishes men from women and therefore the law does not need to treat them identically).

85. *See Miller v. Albright*, 523 U.S. at 446-52.

86. *See id.* at 451.

87. *See id.* at 452. Justice O'Connor stated that even though Justice Stevens' justifications were insufficient under the heightened scrutiny he applied, the justifications he submitted passed rational basis scrutiny. *See id.* at 451-52. She stated: "It is unlikely . . . that any gender classifications based on stereotypes can survive heightened scrutiny, but under rational scrutiny, a statute may be defended based on generalized classifications unsupported by empirical evidence." *Id.* at 452.

88. *See id.* at 452-59. Justices Scalia and Thomas expressed extreme deference to Congress' plenary power over immigration issues, stating that "it makes no difference whether or not § 1409(a) passes 'heightened scrutiny' or any other test Members of the Court might choose to apply." *Id.* at 452-53.

89. 8 U.S.C. §§ 1101, 1431 (2000).

90. *See id.*

91. *See* Press Release, U.S. Dep't of State, Child Citizenship Act of 2000 (Feb. 26, 2001), <http://travel.state.gov/childcit.html>.

92. *See* Ballentine, *supra* note 24.

the regulation implementing the Act is phrased narrowly that it effectively denies benefits of U.S. citizenship to many children born out of wedlock.⁹³

C. The Trend in Domestic Laws Is to Treat Mothers and Fathers Equally

During the colonial period in the United States, a father generally had preferred rights to his children.⁹⁴ But during the industrialization period, when the father's work took him out of the home and into a physically separate workplace, paternal preference was replaced by the "tender years doctrine"⁹⁵ and the "best interests of the child"⁹⁶ principle. Mothers increasingly came

93. See *id.* Aliens are a politically powerless group of people, thus regulations affecting them have triggered heightened scrutiny. See Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 309-10. Rosberg explains:

Given the exclusion of aliens from the political process, it is . . . reasonable for the Court to demand a special showing from the state if it is to classify on the basis of alienage Since the legislature has denied aliens any chance to assert their own interests in the political forum, it cannot expect the courts to maintain their usual deference to the legislature's balancing of the interests.

Id. Legislative reform requires lobbying by groups and politicians to support them. See AM. CIVIL LIBERTIES UNION, LOBBYING OVERVIEW AND INTRODUCTION, at <http://www.aclu.org/congress/overview.html> (last visited Feb. 22, 2002); AM. CIVIL LIBERTIES UNION, HOW TO LOBBY YOUR MEMBERS OF CONGRESS, at <http://www.aclu.org/congress/howtolobby.html> (last visited Feb. 22, 2002); NETWORK, A NATIONAL CATHOLIC SOCIAL JUSTICE LOBBY, WHAT YOU CAN DO (providing background and advice to citizens regarding how to lobby their congressmen and representatives to address their concerns), at <http://www.networklobby.org/page5.htm> (last visited Feb. 22, 2002). The lack of political power on the part of illegitimate children is evidenced by the exclusion of illegitimate children from the CCA. The lack of legislative action favoring illegitimate children born overseas also indicates Congress' lack of interest in the matter even after a 1982 report from the Attorney General calling § 1409 a federal statute "needlessly providing for inequitable treatment of the sexes," and requiring corrective action by Congress. ATTORNEY GENERAL'S REPORT TO THE PRESIDENT ON WOMEN'S EQUALITY, 128 CONG. REC. H5369, 5376 (daily ed. Aug. 5, 1982). Although some groups lobby for immigrants' rights, not surprisingly, the emphasis of such lobbying efforts tends to be on those immigrants who have not been found guilty of criminal conduct. See, e.g., AM. CIVIL LIBERTIES UNION, IMMIGRANTS' RIGHTS, at <http://www.aclu.org/issues/immigrant/hmir.html> (last visited Feb. 22, 2002).

94. See JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE §§ 525-551 (5th ed. 1873). Fathers were viewed as role models to children and were frequently given preference in situations that required a choice between the mother's and the father's raising methods. See *id.*

95. The "tender years" doctrine was a rebuttable presumption in favor of the mother that was used in evaluating the best interests of the child. See CATHARINE MACKINNON, SEX EQUALITY 625 (2001).

96. The "best interest" principle requires that "when the child's welfare seems to conflict with the claims of one or both parents, the child's welfare must prevail."

to be perceived as having the special skill of caring for children.⁹⁷

It is disputed whether the framers intended for men and women to have equal protection under the laws.⁹⁸ But since then, the Equal Protection Clause has been used to strike down various statutes providing dissimilar treatment for similarly situated men and women.⁹⁹ The Supreme Court in *Reed v. Reed* used only the rational basis standard of review to strike down a statute giving preference to men over women to serve as intestate estate administrators.¹⁰⁰ In *Frontiero v. Richardson*, however, the Court applied the strict scrutiny standard of review to invalidate a statute that offered differing benefits to the dependents of male and female members of the armed forces.¹⁰¹ Since *Frontiero*, however, the Supreme Court and lower federal courts have generally only required the government to satisfy the intermediate scrutiny standard when evaluating statutes that treat similarly situated males and females differently.¹⁰²

Id.

97. *See id.*

98. *See* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.4.1 (1997); *see, e.g.,* *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding a state law prohibiting women from bartending unless the woman was the wife or daughter of the bar owner).

99. *See* CHERMERINSKY, *supra* note 98, at § 9.4.1 (stating that regardless of the framers' intentions regarding the scope of equal protection, the Supreme Court has expanded the list of suspect and quasi-suspect classifications to include those based on gender); *see, e.g.,* *Craig v. Boren*, 429 U.S. 190, 210 (1976) (striking down a statute that prohibited the sale of beer to males under the age of twenty-one and to females under the age of eighteen); *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (striking down a statute that gave dependents of male military members greater access to benefits compared to dependents of female military members); *Reed v. Reed*, 404 U.S. 71, 74 (1971) (holding a statute establishing a preference for male administrators of intestate estates unconstitutional). *But see* Nikki Ahrenholz, Miller v. Albright: *Continuing to Discriminate on the Basis of Gender and Illegitimacy*, 76 DENV. U. L. REV. 281, 281 (1998) (criticizing the Supreme Court's *Miller* ruling and describing how the INA discriminates against illegitimate children); Dennis G. Vatsis, *THROWAWAY DADS Making the Case for Fathers: Gender Bias Denies Dads Custody When Parents Divorce*, 80 MICH. B.J. 55, 56 (2001) (stating that a strong gender bias against fathers still exists in Michigan's child custody determinations and suggesting various methods by which gender-biased decisions can be avoided).

100. 404 U.S. at 71 (prohibiting mandatory preference to members of either sex and holding that statute giving preference to male estate administrators over female estate administrators is unconstitutional).

101. 411 U.S. at 677 (applying strict scrutiny and striking a military benefits law that permitted a male military member to claim his spouse as a dependent, whereas a female military member had to show that her spouse was in fact dependent on her for over half of his support).

102. *See* *United States v. Virginia*, 518 U.S. 515, 532-33 (1996); *Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County*, 122 F.3d 895, 907 (11th Cir. 1997) (requiring important governmental interest using substantially related

Twenty-three years after the Court applied strict scrutiny to a gender-based classification in *Frontiero*, the Supreme Court articulated a new "exceedingly persuasive" intermediate scrutiny standard of review in *United States v. Virginia*.¹⁰³ Justice Ginsburg, writing for the majority, stated that the government's justification for the gender classification must be "exceedingly persuasive,"¹⁰⁴ and that the State had to show "at least that the [challenged] classification serve[d] 'important governmental objectives' and that the discriminatory means employed"¹⁰⁵ were "substantially related to the achievement of those objectives."¹⁰⁶ The justifications offered "must be genuine, not hypothesized or invented *post hoc* in response to litigation."¹⁰⁷ She added that the statute could not rely on overbroad generalizations about the differing talents, capacities or preferences of males and females.¹⁰⁸

Congress and state legislatures have also enacted anti-sex discrimination laws equalizing the status and power of men and women.¹⁰⁹ Colorado, for example, permits an illegitimate child to

means); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (using strict scrutiny to evaluate equal protection of a race-conscious government program). Traditionally, strict scrutiny has been used to "smoke out" pretexts and hidden discrimination. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."). Hypothetical justifications offered at the time of trial, permitted when applying rational basis scrutiny, are not permitted under intermediate scrutiny. See *Virginia*, 518 U.S. at 533.

103. 518 U.S. at 533 ("The State must show 'at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982))).

104. *Id.* Courts initially interpreted the "exceedingly persuasive" requirement as demanding a standard higher than intermediate scrutiny. See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 75 (1996) (concluding that *Virginia*'s "exceedingly persuasive" justification requirement effectively heightened the standard of review for gender classifications from intermediate to strict scrutiny); *Eng'g Contractors Ass'n of S. Fla., Inc.*, 122 F.3d at 907 (concluding that intermediate scrutiny should be applied to gender classifications despite confusion as to whether *Virginia* heightened or simply reiterated the gender classification standard of review). But see Pherabe Kolb, *Reaching for the Silver Lining: Constructing a Nonremedial yet "Exceedingly Persuasive" Rationale for Single-Sex Educational Programs in Public Schools*, 96 NW. U. L. REV. 367, 375-76 (2001) (arguing that the standard of review was not heightened but simply delineated, making it easier for educators to defend gender-specific educational programs).

105. *Virginia*, 518 U.S. at 533.

106. *Id.*

107. *Id.*

108. See *id.*

109. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (2000) (equalizing the status of men and women by prohibiting employment

inherit from the father once paternity is established even without the father's voluntary participation.¹¹⁰ It does this in order to shield illegitimate children from the exigencies of parental behavior (or non-behavior).¹¹¹ In addition, many states have enacted custody and adoption statutes treating male and female parents equally.¹¹²

D. The Changing Sociological and Legal Definitions of "Mother" and "Father"

The sociological and legal definitions of "mother" and "father" are changing.¹¹³ The rise in non-marital birth rates,¹¹⁴ divorce

discrimination on the basis of race, color, religion, sex and national origin); *see also* Stephen H. Legomsky, *Immigration, Equality and Diversity*, COLUM. J. TRANSNAT'L L. 319, 319 (1993) (describing ways in which gender discrimination has been eliminated).

110. *See* COLO. REV. STAT. § 15-11-114 (2001) (providing methods for establishing a legal parent-child relationship for intestate purposes).

111. *See id.*

112. *See, e.g.,* Alabama Uniform Parentage Act, ALA. CODE § 26-17 (2001) (adopting the Uniform Parentage Act); *see also* UNIF. PARENTAGE ACT, 9B U.L.A. 299 (2000) (providing guidelines for states' parentage statutes as approved by the National Conference of Commissioners of Uniform Laws). In *Caban v. Mohammed*, an unwed father challenged a New York statute that allowed unwed mothers to block adoption of their children but permitted unwed fathers to block adoption of their children only if the adoption violated the "best interests of the child." 441 U.S. 380, 387 (1979). The state argued that the statute was beneficial to the child's interest in being adopted (i.e., legitimated) since the biological fathers were not often found or did not claim them. *See id.* at 388. The Supreme Court invalidated the statute and eliminated the statutory preference given to natural unwed mothers over unwed fathers where the father is biologically related and had a continuous relationship with the child. *See id.* at 394.

113. *See* Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943, 945 (2001) (arguing that the nuclear family model is no longer workable and that it must be redefined in the context of immigration law); Ryiah Lilith, *The G.I.F.T. of Two Biological and Legal Mothers*, 9 AM. U. J. GENDER SOC. POL'Y & L. 207, 208-11 (2001) (arguing the possibility, in cases where a lesbian couple conceives a child through zygote intrafallopian transfer or gamete intrafallopian transfer, of having two "mothers": the genetic mother and the gestational mother); Dawn Wenk, *Belsito v. Clark: Ohio's Battle with "Motherhood,"* 28 U. TOL. L. REV. 247, 277 (1996) (arguing that an Ohio court's decision that genetic contribution is determinative of a child's natural and legal mother applies in the limited situation where a gestational surrogate does not intend to retain custody of the child); Janet L. Dolgin, *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family*, 32 CONN. L. REV. 523, 542-46 (2000) (presenting the idea of a "genetic family" wherein the family, mother, and father are defined through tests and diagnoses).

114. During the past half-century, non-marital birth rates have increased more than 400%. *See* Battle Robinson & Susan Paikin, *Who is Daddy? A Case for the Uniform Parentage Act (2000)*, 19 DEL. LAW. 23, 23 (2001) (citing DEP'T OF HEALTH AND HUMAN SERVICES, PUB. NO. (PHS) 95-1931, BIRTHS TO UNMARRIED MOTHERS: UNITED STATES, 1980-92, (1996) and DEP'T OF HEALTH AND HUMAN SERVICES, PUB. NO. (PHS) 96-1120, ADVANCE REPORT OF FINAL NATALITY STATISTICS, 1994 (1996)).

rates,¹¹⁵ and numbers of families that include children from surrogacy¹¹⁶ and/or adoption¹¹⁷ have eroded the "nuclear family model,"¹¹⁸ the idealized version of the traditional family.¹¹⁹ Additionally, single fathers¹²⁰ and homosexual parents¹²¹ do not fit

115. See Jason Fields & Lynne M. Casper, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, NO. P20-537, *AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2000* (June 2001) (reporting the statistics of different family households), at <http://www.census.gov/prod/2001pubs/p20-537.pdf>.

116. More couples are choosing to have children using alternative reproductive technology because of its increasing success rates. See Audra Elizabeth Laabs, *Lesbian ART*, 19 LAW & INEQ. 65, 67 (2001) (stating that an increasing number of lesbian women are choosing to have children using alternative reproductive technologies); JOSEPH D. SCHULMAN, GENETICS & IVF INST., "WHAT'S YOUR SUCCESS RATE?": UNDERSTANDING IVF PREGNANCY STATISTICS: PART I, at <http://www.givf.com/success.cfm> (last visited Feb. 24, 2002).

117. Courts have permitted nontraditional families to adopt children. See Karla J. Starr, *Adoption by Homosexuals: A Look at Differing State Court Opinions*, 40 ARIZ. L. REV. 1497, 1497 (1998) (giving examples of cases where homosexual partners have been allowed to adopt children); *In re Adoption of Minor T*, 17 FAM. L. REP. 1523 (D.C. Super. Ct. 1991) (permitting a lesbian mother to adopt the child born to her partner).

118. See Kelly, *supra* note 113, at 945 (stating that in practice and in theory, "the 'tradition' of the nuclear family ideal of two parents and dependent children living as a unit has broken down"); Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 880-81 (1984) (discussing nonexclusive parenthood as a method of approaching certain child custody disputes in which a critical premise of child custody law that parents raise their own children in nuclear families is no longer fair because of the development of parent-child relationships outside of a nuclear family). The number of single-mother families increased from three million in 1970 to ten million in 2000, and the number of single-father families grew from 393,000 in 1970 to two million in 2000. See Fields & Casper, *supra* note 115, at 7.

119. See Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387, 388 (stating that in our society, the nuclear family is the "one form of intimate entity [that] has been so venerated in the culture as to become institutionalized as the model or archetype of intimacy"). But see Kelly, *supra* note 113, at 947-61 (stating that the "nuclear family fiction is perpetuated in the law").

120. According to 1998 U.S. Census data, there were 3,143,000 children under age eighteen living with their father, of whom only 2,566,000 lived with a father who was widowed, divorced, or had never been married. See TERRY A. LUGAILA, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *MARITAL STATUS AND LIVING ARRANGEMENTS* iii (1998).

121. The number of homosexual parents and the number of children they have raised have increased dramatically. See Lilith, *supra* note 113, at 208. In 1987, three million homosexual people in the United States raised between eight and ten million children. See *id.* In 1998, six to ten million homosexual people raised approximately fourteen million children. See *id.* Homosexual parents can adopt children or conceive their own using processes such as gamete intrafallopian transfer ("G.I.F.T."). See *id.* at 209. G.I.F.T. involves removing an egg from one woman and injecting the ova along with semen containing fertile sperm into the uterus of the second woman. See *id.*

the traditional framework.¹²²

Furthermore, because the law recognizes both biological and social aspects of the family, the legal definition of "mother" has been affected by new reproductive technologies.¹²³ The advent of surrogate mothers¹²⁴ as an option for women who are unable or who choose not to give birth has created a new variety of issues regarding the definition of "mother."¹²⁵ There are two types of surrogate parenting: artificial insemination and in vitro fertilization.¹²⁶ With artificial insemination, the resultant baby has a biological mother and an adoptive mother.¹²⁷ With in vitro

122. See Laabs, *supra* note 116, at 65-66 (stating that the decrease in popularity of the traditional family structure has been accompanied by an increase of "nonfamilies" and other types of families, such as non-married heterosexual and homosexual partners living together and "lesbian- and gay-parented families").

123. See Michelle Pierce-Gealy, "Are You My Mother?": *Ohio's Crazy-Making Baby-Making Produces a New Definition of "Mother,"* 28 AKRON L. REV. 535, 539 (1995) (advocating a new "parentage paradigm" because the advent of alternative reproductive technologies has led to a situation where the woman giving birth to a child is not necessarily the legal mother). New alternative reproductive technologies include surrogacy, artificial insemination, in vitro fertilization, and embryo transfers. See Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 187 (1986) (providing a background to the alternative reproductive methods available). Services exist throughout the United States to assist childless couples to find surrogate parents. See Barbara Cohen, *Surrogate Mothers: Whose Baby Is It?*, 10 AM. J. L. & MED. 243, 243-44 (1984). There are also websites offering advice and information regarding surrogacy. See, e.g., THE AMERICAN SURROGACY CENTER (providing information and services regarding surrogacy contracts and laws), at <http://www.surrogacy.com> (last visited Feb. 21, 2002).

124. A surrogate gives birth to another couple's baby by being impregnated with the male's sperm, carrying the baby to term, and then giving up her parental right to enable the adoption of the child. See Joanna K. Budde, *Surrogate Parenting: Future Legislation to Eliminate Present Inconsistencies*, 26 DUQ. L. REV. 633, 634 (1988). In order for the child to be adoptable by the couple that made the arrangement with the surrogate, the surrogate is required to give up her rights to the child because she is biologically related to the child. See *id.* The resulting child would be the product of the surrogate mother's egg and the couple's sperm. See *id.*

125. See generally Stumpf, *supra* note 123, at 187 (stating that surrogacy, along with other reproductive technologies, has challenged the presumption that the mother "was the one from whose womb the child came"); Pierce-Gealy, *supra* note 123, at 562-69 (discussing problems involved with adopting a strict definition of mother based on genetic relationship and arguing that the gestational mother's contributions and rights should be recognized).

126. See Budde, *supra* note 124, at 634 (describing three types of surrogate parenting but noting that the second and third are virtually the same). In vitro fertilization involves taking the egg and sperm of the couple and fertilizing the egg in a laboratory dish. See *id.* at 635. The fertilized egg is then implanted in the surrogate. See *id.*

127. Occasionally issues arise in surrogate arrangements where surrogates have a change of heart and decide to keep the baby, but many of these issues are addressed preemptively by signing agreements before the surrogacy process begins. See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 784 (Cal. 1982) (relying on the

fertilization, the baby has a biological mother and a gestational mother.¹²⁸ Each "mother" in these situations plays a different role, and neither satisfies the stereotypical definition of "mother."¹²⁹ Where the surrogate has no genetic tie to the baby, courts have held that it is permissible to eliminate entirely the surrogate's name from the birth certificate.¹³⁰

Also, more and more courts are recognizing the legal rights of homosexual parents.¹³¹ Currently, an increasing number of gay couples are raising children,¹³² and more single fathers are raising children than in the past. Courts are rejecting concerns based on gay stereotypes and are granting an increasing number of parental rights to gay fathers.¹³³ Gay men in California can become sole parents of children born of a surrogate who is implanted with a donated egg fertilized by the gay father's sperm.¹³⁴ Many states permit "second-parent adoptions" in which an unmarried couple—

agreement signed by both genetic and surrogate mothers to determine the intentions of the parties).

128. A gestational mother is the surrogate who has no biological or physical ties to the baby other than carrying the baby to term. See Budde, *supra* note 124, at 634.

129. See Pierce-Gealy, *supra* note 123, at 562-71 (arguing that Ohio's grant of legal title of "mother" to the genetic mother is unjustified because the role of the genetic mother during the child's gestation is that of simply financially supporting the unborn child while the role of the gestational mother involves physical, emotional, and legal liability).

130. See, e.g., *Belsito v. Clark*, 644 N.E.2d 760, 768 (Ohio C.P. 1994) (holding that the genetic contributors of the baby carried by a surrogate are the legal parents and that their names belong on the birth certificate). The establishment of a mother-child relationship depends on the documentation of the birth certificate or the testimony of a witness regarding the identity of the person who gave birth. See *id.* at 763. These factors are often inaccurate where a surrogate mother is involved. See *id.*

131. See, e.g., *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1321 (Pa. Super. Ct. 1996) (granting standing to a former lesbian life partner to petition for partial custody of a child born to her partner, via artificial insemination, during relationship).

132. See Jim Hill, *Gay Couples Use Surrogates to Help Grow Families*, CNN.COM (Aug. 2, 1998), at <http://www.cnn.com/US/9808/02/gay.surrogacy>.

133. See, e.g., *Boswell v. Boswell*, 721 A.2d 662, 678-79 (Md. 1998) (requiring child custody decisions to be made on the basis of individualized determinations regarding the child's best interests and not on blanket stereotypes about likely harm caused by the presence of the father's gay partner); *In re Marriage of Wicklund*, 932 P.2d 652, 655 (Wash. Ct. App. 1996) (determining that the trial court abused its discretion by conditioning the gay father's parental rights on a requirement that he not practice homosexuality "in the sense of exhibiting, or participating in displays of affection (hand-holding, kissing, etc.) with a partner" in the presence of his children (quoting trial court decree)).

134. See THOMAS M. PINKERTON, *SURROGACY AND EGG DONATION UNDER CALIFORNIA LAW* (providing summaries of California surrogacy laws and discussing generally surrogacy client experiences), at <http://www.surrogacylaw.net/currentlaws.htm> (last visited Feb. 21, 2002).

heterosexual or homosexual—can adopt a child provided the “best interests of the child” are met.¹³⁵ Thus, although not all states provide the same progressive legal rights to homosexual partners as California or New York, there is a definite trend that shows homosexual parents gaining more legal rights than they have held previously.

E. The Increasing Use of DNA Test Results in Determining Paternity

Historically, courts have relied on various forms of evidence to determine paternity.¹³⁶ Although slow and initially apprehensive in adopting new technologies, some courts, together with legislatures, have kept up with advancements in science and tests yielding more accurate paternity results.¹³⁷ Currently, conventional blood testing¹³⁸ is used routinely in immigration proceedings¹³⁹ and to resolve paternity disputes.¹⁴⁰

In the last three decades, paternity testing has undergone tremendous scientific advances.¹⁴¹ Genetic DNA tests¹⁴² evidence

135. See Starr, *supra* note 117, at 1497 (discussing various cases in which courts have permitted same-sex partners to adopt children); see, e.g., *In re Jacob*, 660 N.E.2d 397, 400 (N.Y. 1995) (extending the step-parent adoption to the adoption of a child by a lesbian couple); *In re Adoption of Evan*, 583 N.Y.S.2d 997, 998-99 (N.Y. Sup. Ct. 1981) (holding that adoption by two loving mothers that had a loving relationship would serve the child's best interests).

136. Paternity used to be determined by rudimentary comparisons of physical markers such as extra digits on the hand of the child and putative father or by calculations of the date of conception. See Allan Z. Litovsky & Kirsten Schultz, *Scientific Evidence of Paternity: A Survey of State Statutes*, 39 JURIMETRICS J. 79, 79 (1998).

137. See *id.* State courts admit blood test results into evidence where statutes have authorized them to use these tests to determine a child's parentage. See Alan R. Davis, *Are You My Mother? The Scientific and Legal Validity of Conventional Blood Testing and DNA Fingerprinting to Establish Proof of Parentage in Immigration Cases*, 1994 BYU L. REV. 129, 134 (1994). In some jurisdictions, genetic evidence has been introduced by judicial action. See Litovsky & Schultz, *supra* note 136, at 82-83.

138. “Blood testing” is a comparison of the blood group of the putative parent with that of the child. See Davis, *supra* note 137, at 131.

139. To grant a visa under the immediate family exemption, the naturalized citizen must be the parent or child of the visa applicant. See *id.* at 130-31. Occasionally, a blood test is used to determine whether the applicant is a child or parent of the naturalized citizen in order to determine whether a visa should be granted. See *id.* at 131.

140. See *id.* at 133. Blood testing is relied on as an indicator of non-parentage and is used as supporting testimonial and documentary evidence that a parent-child relationship does exist. See *id.* at 134.

141. See, e.g., *id.* at 129 (discussing recent changes).

142. All genetic information passed on from a parent to a child is contained in DNA molecules. See *id.* at 136. DNA is unique to the individual, its structure

paternity with more than ninety-nine percent accuracy.¹⁴³ DNA testing results are now routinely admitted into evidence in paternity cases.¹⁴⁴ The use of DNA testing in immigration proceedings is also gaining support.¹⁴⁵ Moreover, DNA evidence is

remains unchanged throughout a person's life, and its structure is constant from cell to cell. *See id.* A DNA molecule is long and is comprised of pairs of molecules called "base pairs." *See id.* at 137. The particular sequence in which the base pairs are arranged contains the information necessary to form the human body. *See id.* Though most of the structure and sequences on the DNA molecule are identical from person to person, there are sections of the DNA code that are unique to the individual. *See id.* It is these unique sections that are used to determine the "DNA fingerprint." *See id.* DNA is analyzed by looking at the unique sections of the putative parent's DNA and the child's DNA. *See id.* The strength of similarities between the parent and child's DNA indicates the likelihood of parentage. *See id.* *See generally* Randi B. Weiss et al., *The Use of Genetic Testing in the Courtroom*, 34 WAKE FOREST L. REV. 889 (1999) (presenting an overview of testing techniques and their reliability).

143. *See* Christopher L. Blakesley, *Scientific Testing and Proof of Paternity*, 57 LA. L. REV. 379, 388 (1997) (describing how to calculate paternity test accuracy and stating that by the late 1980s, DNA testing provided probabilities greater than ninety-nine percent). The accuracy of current DNA test results and related technologies are widely accepted. *See, e.g.,* Michael H. v. Gerald D., 491 U.S. 110, 114 (1989) (relying on a genetic test that showed "98.07% probability that [appellant] was Victoria's father"); *In re Estate of Lukas*, 508 N.E.2d 368, 372-73 (Ill. App. Ct. 1987) (considering experts' testimonies that there was a 98.9% probability and a 97.36% probability that the boy claiming to be an heir was the decedent's son); *State ex rel. Williams v. Williams*, 609 S.W.2d 456, 457 (Mo. Ct. App. 1980) (relying on a genetic test in finding that there was a "81.15% possibility that [the defendant] was the father"); NAT'L RESEARCH COUNCIL, COMMITTEE ON DNA TECHNOLOGY IN FORENSIC SCIENCE (1992); David H. Kaye, *DNA Evidence: Probability, Population Genetics, and the Courts*, 7 HARV. J.L. & TECH. 101 (1993); D. H. Kaye & Ronald Kanwischer, *The Admissibility of Genetic Testing in Parentage Litigation: A Survey of State Statutes*, 22 FAM. L.Q. 109 (1988); Davis, *supra* note 137, at 134; Litovsky & Schultz, *supra* note 136, at 80; Thomas M. Fleming, Annotation, *Admissibility of DNA Identification Evidence*, 84 A.L.R. 4TH 313 (1999 & Supp. 2001).

144. *See* Litovsky & Schultz, *supra* note 136, at 83. States have enacted statutes adopting this new technology. *See* Davis, *supra* note 137, at 129. For a summary of the various jurisdictional statute information regarding admissibility of scientific paternity tests, *see* Litovsky & Schultz, *supra* note 136, at 79. As of 1998, thirty-nine states specifically allow the admission of blood test results that are statistically less accurate than DNA tests, and sixteen specifically allow the admission of DNA test results. *See id.* at 86. The Supreme Court has struck down a series of state statutes that barred illegitimate children from establishing their parentage. *See, e.g.,* Clark v. Jeter, 486 U.S. 456, 458 (1988) (stating that "blood tests . . . showed a 99.3% probability that Jeter is Tiffany's father"); Mills v. Habluetzel, 456 U.S. 91, 98 n.4 (1982) (stating that "recent developments . . . have sought . . . to predict paternity with a high degree of probability" although "their evidentiary weight" is a "matter of academic dispute"). *But see* Michael H., 491 U.S. at 112 (refusing to admit evidence of a 98.07% probability of paternity of one man to rebut a presumption of paternity of another).

145. DNA tests are not widely used to resolve immigration cases, but there are particular cases in which DNA evidence was admitted into evidence. *See* Davis, *supra* note 137, at 136 (describing the case of Johnny A-Lo Hoang, a U.S. citizen, who, in order to obtain an immediate family visa for his father, proved his

used frequently in criminal hearings to inculcate and exculpate defendants.¹⁴⁶

II. *Nguyen v. INS: The Court's Interpretation*

After Tuan Anh Nguyen pled guilty to two felony charges, the INS began removal proceedings against him.¹⁴⁷ The INS charged that he was subject to removal as an alien under 8 U.S.C. §§ 1251(a)(2)(A)(ii) and (iii)¹⁴⁸ because he had been convicted of two crimes involving moral turpitude¹⁴⁹ and an aggravated felony.¹⁵⁰ On January 30, 1997, the immigration judge ordered Nguyen to be removed to Vietnam.¹⁵¹ Nguyen appealed the order to the Board of Immigration Appeals (BIA) arguing that he was a U.S. citizen under 8 U.S.C. § 1409 and therefore not subject to removal.¹⁵²

Boulais filed a paternity suit in a Texas district court while Nguyen's appeal to the BIA was pending.¹⁵³ The state court granted Boulais an order of parentage based on his DNA test results indicating that he was Nguyen's father.¹⁵⁴ Even after receiving this evidence of paternity, the BIA dismissed Nguyen's

relationship with his father using a DNA test).

146. See Weiss et al., *supra* note 142, at 906 (stating that several federal courts and state courts have addressed the admissibility of DNA testing to prove guilt or innocence and have generally accepted the procedures and principles as sufficiently valid to permit the admission of DNA test results as evidence). *Andrews v. State* was the first reported appellate discussion of using DNA testing to prove identity. See *Andrews v. State*, 533 So. 2d 841, 843 (Fla. Dist. Ct. App. 1988). In *Andrews*, DNA from a semen sample obtained from a rape victim was compared to the DNA from a blood sample obtained from the alleged rapist. *Id.* at 842-43. An expert testified that the two samples exhibited identical banding that had a one in 839,914,540 chance of occurring. See *id.* at 843. The court accepted the evidence because DNA testing was based on widely recognized, proven scientific principles. See *id.* at 850-57.

147. See *Nguyen v. INS*, 121 S. Ct. 2053, 2057 (2001). The INS generally begins removal proceedings while the alien is serving his or her sentence to ensure that the order of removal is prepared by the time of the alien's release. See WEISSBRODT, *supra* note 7, at 215.

148. See *Nguyen*, 121 S. Ct. at 2057. See Lawyers' Coop. Publ'g Co., *supra* note 13, at 483 (discussing removability of aliens for crimes involving moral turpitude).

149. See *supra* note 13 (defining a crime of moral turpitude).

150. See *supra* note 13 (noting that aliens have been deported for criminal convictions other than those involving moral turpitude).

151. See *Nguyen*, 121 S. Ct. at 2057.

152. See *id.* Nguyen later admitted that he was a citizen of Vietnam and was a permanent resident of the United States. Brief for Respondent at 5, *Nguyen v. INS*, 2000 WL 1868100 (2001) (No. 99-2071).

153. See *Nguyen*, 121 S. Ct. at 2057.

154. See Brief for Petitioner, *supra* note 2, at 7. The DNA test showed to a 99.98% certainty that Boulais was in fact Nguyen's father. See *id.* Texas permits genetic testing results as evidence of parentage. See TEX. FAM. CODE ANN. § 160.621 (2001).

appeal and claim of U.S. citizenship because a DNA test evidencing paternity is not one of the methods by which citizenship can be gained after a child reaches the age of eighteen.¹⁵⁵ Boulais and Nguyen petitioned the Fifth Circuit for a review of the Board's ruling.¹⁵⁶

The Fifth Circuit ruled on the petition for review, holding that §§ 1409(a)(3) and (4) survive heightened constitutional scrutiny.¹⁵⁷ The court of appeals followed the plurality opinion in *Miller*, stating that § 1409 was "well tailored" to meet "several important governmental objectives."¹⁵⁸ The court decided that because Boulais did not meet § 1409's requirements to establish Nguyen's citizenship at birth, Nguyen was an alien convicted of an aggravated felony.¹⁵⁹ Thus, the court of appeals granted the INS's motion to dismiss the petition for review.¹⁶⁰

The Supreme Court granted Boulais and Nguyen's petition for certiorari.¹⁶¹ The Court applied intermediate scrutiny because the lower court had made a gender classification with respect to the parent.¹⁶² Justice Kennedy, writing for the Court, emphasized the importance of the "real difference" between men and women: a woman, by the act of giving birth, cannot avoid being identified as the mother of the child.¹⁶³

The Court accepted the existence of a biological parent-child relationship and some demonstrated opportunity for the child and parent to develop real, everyday ties with each other and with the United States as the important governmental objectives for § 1409(a)(4).¹⁶⁴ Addressing the government's first objective, the existence of a biological relationship between the parent and the child, the Court stated that it was important because "[t]he mother's relation is verifiable from the birth itself and is documented by the birth certificate or hospital records and the witnesses to the birth" while "a father need not be present at the birth, and his presence is not incontrovertible proof of fatherhood."¹⁶⁵ The Court accepted the second governmental

155. See *Nguyen*, 121 S. Ct. at 2057.

156. See *id.* at 2058.

157. See *Nguyen v. INS*, 208 F.3d 528, 535 (5th Cir. 2000).

158. *Id.*

159. See *id.*

160. See *id.* at 536.

161. See *Nguyen*, 121 S. Ct. at 2058.

162. See *id.* at 2059.

163. See *id.*

164. See *id.* at 2060-61.

165. *Id.* at 2055.

objective, "some demonstrated opportunity to develop a relationship that consists of real, everyday ties providing a connection between child and citizen parent and, in turn, the United States,"¹⁶⁶ because the government has an interest in ensuring that the conveyance of citizenship relates to the "realities of the child's own ties and allegiances."¹⁶⁷ The Court again came to this conclusion based on the difference between mothers and fathers by stating that the opportunity to develop "real, everyday ties providing a connection between child and citizen parent and, in turn, the United States . . . inheres in the event of birth in the case of a citizen mother and her child, but does not result as a matter of biological inevitability in the case of an unwed father."¹⁶⁸

The Court then stated that the means used to achieve the government's objectives—legitimation by one of three administrative methods before the child reaches the age of eighteen—were substantially related to establishing a parent-child relationship.¹⁶⁹ According to the Court, Congress chose an "easily administered scheme" that avoided the "subjectivity, intrusiveness, and difficulties of proof that might attend an inquiry into any particular bond."¹⁷⁰ Nguyen argued that "clear and convincing" evidence in the form of a DNA test was sufficient to establish Boulais as his father.¹⁷¹ Refusing to consider the genetic test results together with evidence of Boulais and Nguyen's father-child relationship, the Court stated that the importance of the governmental interest was "too profound to be satisfied by a DNA test because scientific proof of biological paternity does not, by itself, ensure father-child contact during the child's minority."¹⁷²

The Court expressed extreme deference to Congress, stating, "If citizenship is to be conferred by the unwitting means petitioners urge, so that its acquisition abroad bears little relation to the realities of the child's own ties and allegiances, it is for Congress, not this Court, to make that determination."¹⁷³ Justices

166. *Id.*

167. *Id.* at 2063.

168. *Id.* at 2056.

169. *See id.*; see also *supra* text accompanying note 59 (stating the three administrative options to legitimate an illegitimate child born overseas).

170. *Nguyen*, 121 S. Ct. at 2064.

171. *See id.* at 2060-61.

172. *Id.* at 2056.

173. *Id.* at 2062. The Court stated:

Congress is well within its authority in refusing, absent proof of at least the opportunity for the development of a relationship between citizen

Scalia and Thomas concurred in the judgment, noting that they did not believe the Court had the power to confer citizenship on a basis other than one prescribed by Congress.¹⁷⁴ The two Justices, however, concurred with the majority Justices that it could be assumed that a majority of the Court would find the remedial power to strike § 1409(a)(4) if necessary.¹⁷⁵ The Supreme Court, voting five to four, affirmed the court of appeals opinion and held that § 1409(a)(4) was consistent with the equal protection requirement of the Fifth Amendment.¹⁷⁶

The dissent, written by Justice O'Connor, began by noting the history of gender-based discrimination in the United States and the Court's use of heightened scrutiny when evaluating statutes containing gender-based classifications.¹⁷⁷ The dissenting Justices stated that the majority failed to apply properly the intermediate scrutiny standard because it entertained empirical support for governmental objectives behind the enactment of § 1409(a)(4).¹⁷⁸ They also argued that the means did not fit the purported ends of establishing a blood relationship because § 1409(a)(1) already required clear and convincing evidence of a biological relationship between the father and child.¹⁷⁹ O'Connor argued that the requirement of legitimation before the child turned eighteen was superfluous and therefore not a substantial governmental interest.¹⁸⁰ The dissent further criticized § 1409(a)(4) as an "ill fit[ting]" proxy for a parental relationship because it relied on the stereotype that mothers almost always develop caring relationships with their children, while most fathers do not.¹⁸¹ The dissent stated that the majority's discussion "may itself simply reflect the stereotype of male irresponsibility

parent and child, to commit this country to embracing a child as a citizen entitled as of birth to the full protection of the United States, to the absolute right to enter its borders, and to full participation in the political process.

Id. at 2056.

174. *See id.* at 2066 (Scalia, J., concurring).

175. *See id.*

176. *See id.* at 2058-66.

177. *See id.* at 2066-68 (O'Connor, J., dissenting). Justices Souter, Ginsburg, and Breyer joined Justice O'Connor's opinion. The dissent stated that the important governmental objectives must be substantially related to the means used to achieve them, and in addition, that the "reviewing court must determine whether the proffered justification is exceedingly persuasive." *Id.* at 2067 (quoting *United States v. Virginia*, 518 U.S. 515, 532-33 (1996)) (internal quotes omitted).

178. *See id.* at 2066.

179. *See id.* at 2070.

180. *See id.* at 2074.

181. *Id.*

that is no more a basis for the validity of the classification than are stereotypes about the 'traditional' behavior patterns of women."¹⁸²

III. Errors in the Supreme Court's Decision

A. *The Supreme Court Had the Power to Review Whether § 1409 Was a Constitutionally Permissible Means of Implementing Congress' Plenary Power*

The *Nguyen* Court inappropriately deferred to Congress' plenary power to regulate immigration. Congress' plenary power over immigration appeared to be absolute until relatively recently.¹⁸³ Recent decisions by the Supreme Court indicate that Congress' power to regulate immigration is not as complete and immune to judicial review as previously believed.¹⁸⁴

Similarly, Congress' power under the Commerce Clause power was believed to be plenary.¹⁸⁵ Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹⁸⁶ The Commerce power was determined, however, to be limited internally by "[t]he wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections."¹⁸⁷

Like the Commerce power, Congress' plenary immigration power should be limited internally by similar factors. However, people like *Nguyen*, who are aliens convicted of "crimes of violence," and are thus deportable, are not looked upon favorably by Congress.¹⁸⁸ The "wisdom of and discretion of Congress" will not help where Congress does not care to check the interests of convicted aliens. Moreover, Congress probably does not have an "identity with" the aliens. Being a disenfranchised group, aliens are politically powerless.¹⁸⁹ Due to the marginalized position of

182. *Id.* at 2077.

183. See *supra* notes 39-40 and accompanying text.

184. See *supra* notes 41-45 and accompanying text.

185. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat. 1) 1, 196 (1824) ("This power, like all others vested on Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than one prescribed in the Constitution.").

186. U.S. CONST. art. I, § 8, cl. 3.

187. *Gibbons*, 22 U.S. at 196.

188. See *supra* note 93.

189. The exclusion of benefits for illegitimate children such as *Nguyen* in the CCA evidences illegitimate children's lack of political power. See *supra* notes 89-93 and accompanying text.

convicted aliens, it would have been reasonable for the Court to deviate from its usual level of deference to Congress.¹⁹⁰

The Court had the authority to review the legitimation requirement—the “unwitting means”¹⁹¹—because in challenging the requirement, Nguyen did not question Congress’ unquestionable plenary power over aliens. Instead, Nguyen challenged, “whether Congress has chosen a constitutionally permissible means of implementing [its plenary power],” which is open to judicial review. The Court stated that it need not “assess the implications of statements in our earlier cases regarding the wide deference afforded to Congress in the exercise of its immigration and naturalization power.”¹⁹² A challenge to the procedure set forth by Congress—the *means* by which Boulais was required to legitimate his child to confer U.S. citizenship—is not a challenge to Congress’ power to regulate immigration, but a challenge to the method in which Congress used its power. The Court should have clearly stated that it could exercise judicial review because the question before it was whether the legitimation procedures Congress enacted are a *constitutionally permissible means* of implementing its power over immigration.

B. The Court Erred in Hypothesizing and Accepting Governmental Objectives Themselves Erroneously Premised on the Idea That a Biological Relationship Between a Mother and Her Child Necessarily Exists in the Very Event of Birth

There is a colorable argument that the Court failed to apply the correct standard of review as set forth in *United States v. Virginia*. *Virginia*’s standard of review requires “exceedingly persuasive” justifications, but it appears that there is some confusion among scholars and the courts as to whether the exceedingly persuasive standard is a higher standard than the traditional intermediate scrutiny standard.¹⁹³ The *Nguyen* Court applied the traditional intermediate scrutiny standard.¹⁹⁴ By doing so, the Court appeared to imply either that the correct standard of review is the traditional standard, where important governmental objectives must be met with substantially related

190. See *supra* note 93 and accompanying text.

191. *Nguyen v. INS*, 121 S. Ct. 2053, 2062 (2001).

192. *Id.* at 2065.

193. *United States v. Virginia*, 518 U.S. 515, 533 (1996); see *supra* note 104 and accompanying text.

194. See *Nguyen*, 121 S. Ct. at 2059.

means, or that the exceedingly persuasive standard articulated in *Virginia* was not meant to be any tougher than the traditional intermediate scrutiny standard.

The Court misapplied the intermediate scrutiny standard by entertaining hypothesized governmental objectives for the enactment of § 1409(a)(4).¹⁹⁵ In following the standard articulated in *Virginia*, the Court should have evaluated the justifications that the government submitted to determine whether they were "genuine, not hypothesized or invented *post hoc* in response to litigation."¹⁹⁶ The Court ignored statements of purpose of previous immigration statutes that aimed to limit citizenship claims by "those who may be a liability rather than an asset."¹⁹⁷ The Court also ignored a statement made by the Attorney General in 1982 that § 1409 "needlessly provides for inequitable treatment of the sexes."¹⁹⁸ These statements demonstrate that Congress did not base the legislation on any "real" difference between men and women. Instead, the statements show that § 1409 was intended to protect U.S. citizen men from their unscrupulous and irresponsible behavior when they are overseas by implementing an arbitrary procedure for fathers of illegitimate children born abroad to legitimate their children.¹⁹⁹ The protection granted to men under § 1409 perpetuates the cycle in which men are not held responsible for their overseas sexual encounters, and is, in effect, a self-validating statute.²⁰⁰ By permitting Congress to claim the existence of a biological parent-child relationship and the opportunity for the parent and child to develop a meaningful connection as important governmental objectives, the Court held

195. See *id.* at 2060-63.

196. *Virginia*, 518 U.S. at 533. The stated important governmental objective of ensuring a biological relationship between the parent and child is in congruence with the *jus sanguinis* citizenship principle that confers citizenship at the moment of birth regardless of where the child is born. See *supra* notes 46-47 and accompanying text.

197. H.R. REP. NO. 76-2396, at 2 (1940).

198. See ATTORNEY GENERAL'S REPORT TO THE PRESIDENT ON WOMEN'S EQUALITY, 128 CONG. REC. H5369, 5376 (daily ed. Aug. 5, 1982); *supra* note 93 and accompanying text.

199. See *supra* note 93 and accompanying text (illustrating the lack of political power of aliens that makes this possible).

200. See GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 727 (3d ed. 1996) (citing Justice O'Connor's opinion in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), in which she stated that the University's policy "makes the assumption that nursing is a field for women a self-fulfilling prophecy"); see also CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 3, 8-9 (1987) (arguing that gender differences are socially constructed and serve to reinforce male domination).

the government to a lower standard of review than that of intermediate scrutiny.

The Court based both of these governmental objectives on the false assumption that a biological relationship necessarily exists between a mother and her child by the event of birth. The Court failed to recognize the advancement and increasing popularity of alternative reproductive technologies when it assumed that the woman giving birth to the child is necessarily the biological mother of that child.²⁰¹ Where the mother is not the biological mother, a biological parent-child relationship cannot inhere in the very event of the birth of the child.²⁰² While there is a chance that the surrogate may attempt to claim parental rights over the child, it is unlikely that the surrogate will receive any parental rights, because a genetic relationship is absent, and there is most likely a surrogacy contract with the genetic parents of the child.²⁰³ Thus, the majority's conclusion that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood"²⁰⁴ is outdated and does not recognize the advancement of alternative reproductive technologies.

The Court instead embraced a familial structure based on the old-fashioned and outdated idea of a nuclear family by assuming that the very event of birth automatically established a parent-child biological relationship.²⁰⁵ The typical family no longer necessarily consists of one mother, one father, and children.²⁰⁶ The Court's statements that the biological mother-child relationship is "documented in most instances by the birth certificate or hospital records and the witnesses who attest to her having given birth"²⁰⁷ and that "the mother is always present at birth"²⁰⁸ raises questions as to its understanding of the controversy surrounding legal parentage and which parents' names are placed on birth certificates.²⁰⁹

201. See *supra* notes 123-130 and accompanying text.

202. See *supra* note 130 and accompanying text.

203. See *supra* notes 123-130 and accompanying text.

204. *Nguyen v. INS*, 121 S. Ct. 2053, 2060 (2001).

205. See *supra* notes 118-120 and accompanying text.

206. See *supra* notes 113-122 and accompanying text.

207. *Nguyen*, 121 S. Ct. at 2060.

208. *Id.* at 2061.

209. See *supra* note 130 and accompanying text.

C. The Legitimation Procedures Are Not Substantially Related to the Important Governmental Objectives

1. *The Legitimation Requirements Are Not Substantially Related To Ensure the Existence of a Biological Parent-Child Relationship*

The legitimation procedures of § 1409(a)(4) are not substantially related to achieving the important governmental objective of ensuring the existence of a biological parent-child relationship. Section 1409(a)(1) already requires that a biological relationship be established with clear and convincing evidence.²¹⁰ All three legitimation methods provided in § 1409(a)(4) are superfluous. There is a rule of statutory construction that surplusage be avoided.²¹¹ The additional legitimation in § 1409(a)(4)(A) is, practically speaking, the same as the proof of blood relationship required in § 1409(a)(1), since many states simply require scientific proof of paternity in their legitimation proceedings.²¹² Under the rule to avoid surplusage, the Court should have looked at the repetitive nature of §§ 1409(a)(1) and 1409(a)(4) more critically.

The Court did acknowledge that the required methods are not necessarily the most effective way to achieve the stated important governmental interests.²¹³ But under intermediate level review, it is not necessary that the alternative means carry out the asserted objectives as well or better without causing needless disadvantage to anyone.²¹⁴ For the sake of administrative convenience, the methods by which the governmental interests are achieved may be less efficient than other methods, but they still must satisfy the substantially related test.²¹⁵ The legitimation procedures under § 1409(a)(4) were

210. See 8 U.S.C. § 1409(a)(1) (2000) ("[A] blood relationship between the person and the father is established by clear and convincing evidence.").

211. See *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion by Scalia, J.) (stating that it is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant"). Interpreting a statute using the whole act rule, the interpreter should presume that every word and phrase adds to the statutory command. See *Exxon Corp. v. Hunt*, 475 U.S. 355, 369 n.14 (1986).

212. Texas, for example, permits genetic testing results as evidence of parentage. See TEX. FAM. CODE ANN. § 160.621 (2001).

213. See *Nguyen v. INS*, 121 S. Ct. 2053, 2064 (2001).

214. See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

215. See *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) ("[A]ny statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment

administratively convenient, and thus only satisfied the lower standard of rational basis scrutiny.²¹⁶

Acknowledgement of paternity under oath, an alternative legitimization method under § 1409(a)(1)(B), could serve as a substantially related alternative to a DNA test because the potential father makes his assertions under a threat of the penalty for perjury.²¹⁷ However, where a blood relationship is already proved by clear and convincing evidence under § 1409(a)(1), an oath asserting paternity is superfluous.²¹⁸ The last legitimization method under § 1409(a)(4)(C), adjudication by court, is similarly superfluous.²¹⁹

DNA test results are a more reliable and substantially related indicator of a biological relationship.²²⁰ Nguyen argued that he had provided clear and convincing evidence of parentage in the form of a positive DNA test.²²¹ Nguyen could show with practically incontrovertible proof that he and Boulais had a biological parent-child relationship.²²²

The Supreme Court should have permitted DNA evidence of the biological relationship because it is used and relied upon extensively in courts nationwide.²²³ Courts permit the testimony and evidence from physicians, geneticists, statisticians, and technicians regarding the genetic probability that the defendant in a paternity suit is the biological father.²²⁴ In some states, probabilities are not only permitted as evidence, but also create a presumption of paternity that the alleged father must overcome with clear and convincing evidence.²²⁵ Even the Supreme Court appears to be satisfied by the probabilities and availability of scientific proof of parentage.²²⁶

DNA testing has been used in immigration cases under different circumstances.²²⁷ Allowing Boulais to prove his paternity

for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution].'" (quoting *Reed v. Reed*, 404 U.S. 71, 77 (1971)).

216. See *supra* notes 169-170, 214-215 and accompanying text.

217. See 8 U.S.C. § 1409(a)(4) (2000).

218. See *supra* notes 142-144 and accompanying text.

219. Compare 8 U.S.C. § 1409(a)(1) (2000) with 8 U.S.C. § 1409(a)(4)(C) (2000).

220. See *supra* notes 142-146 and accompanying text.

221. See *Nguyen*, 121 S. Ct. at 2060.

222. See *supra* notes 143-144 and accompanying text.

223. See *supra* note 143 and accompanying text.

224. See *supra* note 143.

225. See *Kaye & Kanwischer*, *supra* note 143, at 113-14 tbl.1.

226. See *supra* note 144 and accompanying text.

227. See *Davis*, *supra* note 137, at 130-31. The author discussed an immigration

by submitting a DNA test would have been logical in light of the trend in state courts and the Supreme Court to permit DNA tests.²²⁸ Denying the use of such tests to prove Boulais' biological fatherhood cuts against many past decisions the Court has made with regard to genetic testing.

Even if the means prescribed in § 1409(a)(4) were substantially related to establishing a biological relationship between the parent and child, the additional requirement of performing the legitimation before the child reaches the age of eighteen is not substantially related to establishing a biological relationship. DNA tests are flexible and reliable. Samples may be collected from any bodily fluid or tissue and at any time—even years after a child turns eighteen—because the genetic makeup of a person does not change over the course of his or her life.²²⁹ Since the “freshness” of the DNA is thus not an issue, the requirement that a child be legitimated before the age of eighteen is not substantially related to the purpose of ensuring the existence of a biological relationship between the child and the parent.

2. The Legitimation Requirements Are Not Adequate to Ensure the Opportunity to Establish a Meaningful Parent-Child and Child-United States Relationship

Even if ensuring the existence of an opportunity to establish a meaningful parent-child and child-United States relationship is a sufficiently important governmental objective, the legitimation procedures of § 1409(a)(4) are not substantially related to achieving that end. The legitimation procedures are administrative tasks. If the father knows that he must acknowledge paternity by performing one of the three prescribed procedures to convey U.S. citizenship, the three options are hardly a barrier to legitimating his relationship with his child.²³⁰ The legitimation procedures are so administrative in character that it is difficult to see how they provide the opportunity for a father to establish the meaningful relationship—one that might develop “real, everyday ties.”²³¹

case in which a son with U.S. citizenship used genetic testing to prove his foreign national parents' parentage in order to gain them admission into the United States. *See id.*

228. *See supra* notes 137-146 and accompanying text.

229. *See Weiss et al., supra* note 142, at 905.

230. *See supra* notes 213-219 and accompanying text.

231. The procedures are simple. There are websites that offer advice to fathers on how to represent themselves *pro se* and even offer sample legal briefs. *See, e.g., FATHERS ARE PARENTS TOO!, BEING A FATHER TO YOUR CHILD AND THE IMPORTANCE OF LEGITIMATING YOUR CHILD, at*

Simply because a father performs a legitimation procedure does not necessarily mean that he has had the opportunity to establish a meaningful relationship. For example, a father who only cares about his illegitimate child for the purpose of claiming the child as a dependent for a tax "write off" could easily overcome the evidentiary requirements supposedly proving the existence of a "meaningful relationship" between the father and the child.²³² The legitimation methods are not sufficiently related to demonstrate "real, everyday ties" such that the parent-child relationship that exists is more significant than one "recognized . . . by the law."²³³

The Court's reliance on the "real difference" between men and women as the reason for not requiring the mother to perform the legitimation procedures is faulty.²³⁴ The mother of the child does not necessarily have the opportunity to establish a meaningful relationship with her child by the very event of birth, because the mother may not be the woman giving birth to the child. The Court failed to acknowledge the increase in births resulting from alternative reproductive technology.²³⁵

Additionally, where the woman giving birth to the child is the biological mother, the Court should not have relied on gender stereotypes in determining that a mother has an inherent connection with the child.²³⁶ The idea that a mother has such a connection with her child has been rejected with the replacement of the "tender years doctrine" and the "best interests of the child" principle.²³⁷ No scientific studies have identified an "inherent" bond between a mother and a child.²³⁸ The Court had little, if any,

<http://www.fapt.org/issues/legitimation.html> (last visited Feb. 19, 2002).

232. See LAWRENCE D. GORIN, DADS AGAINST DISCRIMINATION, USA, TAX TIPS FOR FATHERS OF CHILDREN BORN OUT OF WEDLOCK: CLAIM THE CHILD AS YOUR DEPENDENT, (giving tax advice and advising that "custody does not matter"), at <http://www.dadsusa.com/tax.htm> (last revised Feb. 2002); see also JEFF EDWARDS, PATERNITY INFORMATION PAGE (providing legal advice to fathers of illegitimate children on a web page "created to present paternity information for fathers from a father's point of view"), at <http://www.peak.org/~jedwards/paternity.html> (last updated Mar. 23, 2001).

233. *Nguyen v. INS*, 121 S. Ct. 2053, 2061 (2001).

234. See *id.* The Court further differentiated the relationship between a mother and child from that between a father and child, stating, "The mother knows that the child is in being and is hers and has an initial point of contact with him." *Id.* at 2061.

235. See *supra* note 116 and accompanying text.

236. See *United States v. Virginia*, 518 U.S. 515, 565-66 (1996) (stating that Virginia must not assume the demand for a women's school of civil engineering or a men's school of nursing based on gender stereotypes).

237. See *supra* notes 95-97 and accompanying text.

238. Although there are articles available studying the quality of childcare and stability of mother-child relations, there are no articles that report a scientific link

evidence on which to base its assumption that such a bond exists between a mother and her child. Without this evidence, the Court should not have made the assumption at all.

Fathers do not have to be at the birth of their child, but neither does the biological mother when a surrogate is carrying the biological mother's baby to term.²³⁹ The Court, while stating that it would not rely on stereotypes when evaluating gender classifications, stereotyped fathers of illegitimate children as uncaring and uninterested in their children's lives. The Supreme Court has recognized that fathers have an equally important right to have a parental bond with their children as mothers do by striking statutes that provide for dissimilar treatment for similarly situated men and women.²⁴⁰ Additionally, there is a trend among courts to prohibit custody decisions based on stereotypes of sexual orientation.²⁴¹

The Court relied on its outdated ideas of the traditional structure of the nuclear family when in fact alternative family structures are becoming increasingly popular.²⁴² Some states have recognized that where the father is a surrogate by way of donating sperm to a lesbian couple, he has a connection to the child and therefore should receive visitation privileges.²⁴³ This shows the trend in laws to recognize more and more fathers' rights and a change in the structure of what once was perceived as the nuclear family.²⁴⁴

The Court also gave undue merit to the government's argument that the loyalty to the United States of an illegitimate child born overseas to a U.S. citizen father is an important consideration.²⁴⁵ Congress infers loyalty of the illegitimate child

identifying the mysterious "inherent" bond. See, e.g., NICHD Early Child Care Research Network, *Child Care and Mother-Child Interaction in the First 3 Years of Life*, 35 DEVELOPMENTAL PSYCHOL. 6 (1999) (studying associations between amount, quality and stability of child care and mother-child relationships); Pat Etheridge, *Study: Day Care Slightly Weakens Child-Mother Bond*, CNN.COM (Nov. 8, 1999) (reporting study findings that day care affects the bond between a mother and her young child negatively compared to the bond between stay-at-home mothers and their children for whom they care at home), at <http://www.cnn.com/US/9911/08/daycare.dilemma/>.

239. See *supra* notes 123-130 and accompanying text.

240. See *supra* notes 109-112 and accompanying text.

241. See cases cited *supra* note 133 and accompanying text.

242. See *supra* notes 114-122 and accompanying text.

243. See, e.g., *Jhordan C. v. Mark K.*, 224 Cal. Rptr. 530 (Cal. Ct. App. 1986).

244. See *supra* notes 132-133 and accompanying text.

245. See *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) ("In the inevitable process of 'line drawing,' Congress has determined that certain classes of aliens are more likely than others to satisfy national objectives without undue cost, and it has

born overseas as long as the mother is a U.S. citizen.²⁴⁶ It is absurd to believe that loyalty and allegiance to the United States passes in the very event of birth. The argument that somehow a child of a father will be less loyal to the United States is based on the stereotype that fathers do not want to have an important role in raising the child.²⁴⁷ A more substantially related means to ensure the opportunity to establish a child's loyalty to the United States would be the requirement of exposure to American history and culture, whether it be in the form of living in the United States or living with a U.S. citizen mother or father.²⁴⁸

Conclusion

In the end, Nguyen got the short end of the deal. His father, ignorant of the legitimization requirement, failed to complete one of the three administrative tasks required before Nguyen turned eighteen. The Court's biased views and stereotypes of the character of a family, and what does and what should constitute a father and a mother, underlie the *Nguyen* decision. Boulais and Nguyen met the important governmental objectives of establishing a meaningful relationship, yet they were unable to do so using the means prescribed by the statute. The Court had the power to

granted preferential status only to those classes."'). The politics involved in immigration law and policy are complex. See WEISSBRODT, *supra* note 7, at 47. People who argue against free immigration raise concerns regarding the potentially decreased standard of living, while people who argue for free immigration raise moral concerns such as how current citizens, themselves beneficiaries of immigration, can exclude future immigrants. See *id.* at 47-48. Anti-immigration proponents who value nationalism and loyalty to the United States also have a fear of "cultural fragmentation," which stems from a concern that immigration will eliminate a U.S. national identity. See *id.* at 47.

246. See *Nguyen v. INS*, 121 S. Ct. 2053, 2061 (2001). The Court imputes the parent-child relationship to the relationship between the child and the United States, discussing the connections as "real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States." *Id.*

247. See *supra* note 120 (rebutting the stereotype that fathers are typically not interested in raising their children).

248. A test to prove exposure to American culture and values—whatever it is that the government believes is a sign of loyalty—might be substantially related to the achievement of the governmental objective of opportunity to establish a relationship between the child and the United States. One example of the type of test that might be substantially related is a simplified U.S. history test for children with a low threshold for passing because the government cares about the opportunity for the child to develop a relationship with the United States, not that the child is *actually* loyal to the United States. An alternative test that is substantially related to the important governmental objective of confirming a meaningful relationship between a parent and the child would be to interview them, similar to the interview process for married couples where one partner is a U.S. citizen and the other is a foreign national wishing to gain U.S. residency.

strike the statute for lack of substantial relationship between the important governmental objectives and the means used. The Court could have permitted genetic testing, a less restrictive alternative means, to be used where the restrictive and less related means of administrative legitimation had not taken place.

In an age in which fathers are gaining more rights in the fields of custody and adoption, and children are gaining more rights in establishing parenthood using genetic tests, the Supreme Court's decision to stick with its outdated stereotypes of mothers and fathers can only be due to their intentional blindness to the changing times. In cases such as Tuan Anh Nguyen's, where he may not have even known that he was not a U.S. citizen, naturalization after the age of eighteen is not a practical solution. He would only have taken affirmative steps to become naturalized had he known. The Court's overly deferential attitude towards Congress' arbitrary procedures and restrictions make children such as Nguyen, born overseas and out of wedlock, the victims of their parents' ignorance.